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No. 96-1737

In The

Supreme Court of the United States

October Term, 1996

GORDANA SWANSON,

Petitioner,

vs.

DON KNABE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent DON KNABE ("Knabe") respectfully sets forth herein his opposition to Petitioner GORDANA SWANSON's ("Swanson") Petition for Writ of Certiorari (the "Petition").

INTRODUCTION

In this Opposition, Knabe first seeks to point out why this matter should not be reviewed by the United States Supreme Court. Knabe then seeks to point out, pursuant to Supreme Court Rule 15(2), various misstatements of fact and law in the Petition that bear on what issues properly would be before the Court if certiorari were granted.

1. The Court Should Not Exercise Jurisdiction Over This Matter

Swanson asserts that this Court has jurisdiction to review the California Supreme Court's January 28, 1997 order denying review under 28 U.S.C. Section 1257(a) and Supreme Court Rules 10(a) and 10(c) (Petition, 2). As set forth below, the Court should not grant review under these provisions, or at all.

A. The Court Should Not Grant Review Based on 28 U.S.C. Section 1257(a)

Swanson claims in the "Jurisdiction" section of her Petition that this Court may review this case under 28

U.S.C. Section 1257(a) "since the California courts' application of California's SLAPP statute is unconstitutional, and therefore 'repugnant to the Constitution . . . of the United States' " (Petition, 2).

While Swanson argues that the Anti-SLAPP statute is unconstitutional, the statute has already withstood at least one comprehensive constitutional challenge in the California courts.

In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855 ("*More I*"), the California Court of Appeal, First District, determined that the statute, when properly construed, does not violate the right to trial by jury, does not deny due process and does not deprive plaintiffs of equal protection of the laws. Particular aspects of the court's findings in *More I* are set forth below under the appropriate subject headings.

B. The Court Cannot Grant Review Based on Supreme Court Rule 10(a)

Rule 10(a) contemplates Supreme Court review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a decision by a lower court, as to call for an exercise of this Court's supervisory power."

As this case comes to the Court after making its way through the California state courts, and not through the federal courts or the United States court of appeals, Rule 10(a) does not apply.

C. The Court Should Not Grant Review Based on Supreme Court Rule 10(b)

Even though Swanson does not mention Supreme Court Rule 10(b) in the "Jurisdiction" portion of her Petition or elsewhere, if she had mentioned it, the Court should still not grant review under that rule.

Rule 10(b) contemplates Supreme Court review where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

1) The California Courts Did Not Decide an Important Federal Question, but Merely Ruled on the Scope of a State Procedural Statute

In declining to review the California Court of Appeal's decision affirming the trial court's dismissal of Swanson's SLAPP suit against Knabe, the California Supreme Court did not decide an important federal question. Indeed, a review of the appellate court ruling reveals that the appeal presented "an issue regarding the scope of the anti-SLAPP statute, [California] Code of Civil Procedure section 425.16" (Petition, 8a). Far from deciding an important federal question, the appellate

court merely ruled on a state procedural statute – a subject clearly not worthy of Supreme Court review.

2) The California Courts' Decision Does Not Conflict With the Decision of Another State Court of Last Resort

Even if the California Supreme Court action (by declining to review the Court of Appeal's decision) somehow involved an important federal question, its decision does not conflict with the decision of another state court of last resort.

Swanson argues that a "conflict between different states on the constitutionality of SLAPP statutes is dramatically shown by a recent opinion of the New Hampshire Supreme Court, which examined a proposed SLAPP statute modeled on California's version, and found that it would be unconstitutional." (Petition, 22, citing *Opinion of the Justices,* 138 N.H. 445, 641 A.2d 1012 (1994)).

Swanson grossly mischaracterizes the New Hampshire Supreme Court opinion in an attempt to create a conflict among the California and New Hampshire Supreme Courts. The New Hampshire decision focuses solely on the New Hampshire State Constitution, as evidenced by the questions presented:

> "1. Is the procedure for consideration of a special motion to strike, as proposed in SB 661, permitted by the provisions of the *New Hampshire Constitution,* Part 1, Article 20, which guarantees the right to trial by jury in civil cases?

2. Is the procedure proposed by SB 661 otherwise permitted by the *New Hampshire Constitution*?" (emphasis added).

Regardless of what the New Hampshire Supreme Court concluded, its ruling was limited to the New Hampshire Constitution, and thus it did not decide an important, or any, federal question. Accordingly, as neither the California nor the New Hampshire Supreme Courts decided a federal question in their consideration of their states' respective Anti-SLAPP statutes, there can be no conflict that brings Swanson's Petition within the ambit of Rule 10(b).

D. The Court Should Not Grant Review Based on Supreme Court Rule 10(c)

Rule 10(c) contemplates Supreme Court review where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." As set forth above, the California Courts did not decide a question of federal law. Accordingly, review cannot be granted under Rule 10(c).

In addition, a cursory review of federal rights which Swanson claims were violated by the California Courts also reveals that there is no need for this Court to consider this matter further.

1) Swanson's Free Speech and Petition Rights Were Not Violated

Swanson argues that "[t]he California courts' rulings discriminate against [her] as a political candidate, and violate her constitutional rights of petition and free speech by refusing to allow her reasonable access to the courts to pursue her claims under the Political Reform Act" (Petition, 14). While Swanson claims that "the California courts focused on [her] status as a rival political candidate rather than on the nature of the defendant's conduct" (Petition, 14), the appellate opinion itself reveals that its focus was proper and need not be reviewed.

While the California courts clearly acknowledged that Swanson and Knabe were "rival candidates" (Petition 9a), and while that was an important consideration in determining Swanson's motives for bringing her lawsuit, the California courts primarily focused on the allegations of the Complaint and the alleged actions of Knabe.

Specifically, the California courts, guided by the statute itself and the clear authority of *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628 and other decisions, focused on whether Swanson's allegations arose "from any act of [Knabe] in furtherance of [his] right of petition or free speech under the United States or California Constitution in connection with a public issue." (Petition, 16a).

The California courts found that:

> "The statutory language is clear. A plaintiff's action is initially tested under section 425.16, subdivision (b). . . . This test only requires that the defendant establish the plaintiff's cause of action or complaint 'arises from' the defendant's valid exercise of free speech or petition rights concerning a matter of public interest. . . . Contrary to Swanson's assertion, the statute does not limit its application to only constitutionally protected activity. The Legislature did not intend 'that to invoke the special motion to strike the defendant must first establish its actions are constitutionally protected under the First Amendment as a matter of law. If this were so the second clause of subdivision (b) of section 425.16 would be superfluous because by definition the plaintiff could not prevail on its claim' " (Petition, 16a-17a, citing *Wilcox* and *Wollersheim*).

After accurately setting forth the proper test, the California courts found that Swanson's allegations "were made in connection with [Knabe's] campaign and fundraising efforts, both of which are First Amendment activities" (citing *Buckley v. Valeo* (1976) 424 U.S. 1) and that the "allegations affect the exercise of Knabe's free speech rights as a public official and as a candidate" (Petition, 17a).

After its lengthy recitation of the facts (Petition, 9a-15a) and its thorough analysis of the law (Petition, 15a-24a), the California courts properly concluded that "the trial court correctly determined that Knabe satisfied the threshold requirement that Swanson's action fell

within the ambit of the anti-SLAPP statute." (Petition, 17a-18a).

Among Swanson's other arguments in her Petition (many of which Knabe believes do not require a response), is Swanson's claim that "if a private citizen who was not a rival political candidate had filed the underlying action against Knabe . . . , there would be no question that such a lawsuit would not violate the SLAPP statute. . . . " (Petition, 17).

Because the California courts focused only in small part on Swanson's "rival candidate" status, and primarily on Knabe's alleged actions and the Complaint's allegations, the California courts would have reached the same result had *anyone* filed the Complaint. Swanson's claim of discrimination therefore cannot be taken seriously.

To the extent Swanson's discrimination claim is really an equal protection argument, the *More I* court found that the Anti-SLAPP statute does not violate the equal protection clause. There, where the plaintiff contended that "the statute infringe[d] upon its ability to access the judicial system and, thus, violated its right to equal protection" the court disagreed. The *More I* court stated, at 865, that "Statutes that classify litigants and impose differing procedural requirements are generally valid so long as classification is supported by a rational basis" (citing *Hung v. Wang* (1992) 8 Cal.App.4th 908, 925-926).

Accordingly, Swanson's claims that her free speech and petition rights were violated because of the restrictions on her access to the courts cannot be given any credence.

2) Swanson's Due Process Rights Were Not Violated

To the extent Swanson argues that her due process rights were violated by not being granted leave to conduct discovery (Petition, 18-22), it should be noted that the California appellate court ruling found that "Swanson could have conducted discovery if she had shown good cause and focused her requests to those that would enable her to get over the statutory procedural hurdle. . . . Swanson was not prevented from conducting discovery. . . . Swanson just refused to abide by the statutory limitations put on her requests. . . . " (Petition, 23a).

Consistent with the finding in the instant case, the court in *More I*, at 868, concluded that where a plaintiff does not make a timely and proper showing as to the need for discovery, "the statute does not violate a plaintiff's right to due process of law. . . . "

3) Swanson's Jury Trial Rights Were Not Violated

To the extent Swanson argues that her jury trial rights were violated (Petition, 18), it should be noted that the federal right to a jury trial in civil matters provided by the United States Constitution's 7th Amendment is not applicable to the states, so there is no federally protected right to a jury trial in state civil court proceedings. *See* Nowack, Rotunda & Young, *Constitutional Law*, 3d ed., 1986, 486, fn. 12 (citing *Minneapolis and St. Louis R.R. Co. v. Bombois* (1916) 241 U.S. 211).

In addition, the *More I* court found, at 867, that "Section 425.16 requires the plaintiff whose cause of action is subjected to that special motion to strike simply to demonstrate by affidavit a prima facie case. Thus, properly construed[,] section 425.16(b) does not violate the right to a jury trial."

2. The Court Should Note Swanson's Misstatements of Fact and Law

Pursuant to Supreme Court Rule 15(2), Knabe hereby brings to the Court's attention Swanson's numerous misstatements of facts and law that bear on what issues properly would be before the Court if certiorari were granted. For ease of reference, Knabe sets forth the Swanson misstatement(s) (underlining and numbering the misstated language) and then, using corresponding numbers, provides a brief explanation as to why Knabe perceives the language to be a misstatement of fact or law.

A. Swanson's Misstatements

"By dismissing petitioner Gordana Swanson's lawsuit under California's SLAPP statute [1] *because she was a rival political candidate,* and [2] *without giving her any opportunity to take discovery,*

1. Did the California courts violate Swanson's constitutional rights of free speech and petition, by [1] *focusing on her status as a rival political candidate rather than on respondent Don Knabe's alleged wrongful conduct?* . . .

3. Is the California SLAPP statute unconstitutional on its face (especially since [3] *the New Hampshire Supreme*

Court has already held that draft legislation modeled on California's statute would in fact be unconstitutional), and should certiorari be granted to resolve the [4] *growing conflict among the states on the constitutionality of SLAPP statutes?"* (Petition, i).

Reasons for Knabe Objection to Misstatements

[1] As discussed hereinabove, the lawsuit was not dismissed "because [Swanson] was a rival political candidate" of Knabe.

[2] As discussed hereinabove, Swanson was given an opportunity to take discovery. She could have done so upon a showing of good cause, but failed to make the necessary showing.

[3] As discussed hereinabove, the New Hampshire Supreme Court's ruling was based on the New Hampshire state constitution and thus is inapposite.

[4] As discussed hereinabove, there is not a "growing [nor any] conflict among the states."

B. Swanson's Misstatements

"QUESTION NO. 1: [1] *The California Courts . . . Focused On [Swanson's] Status as a Rival Political Candidate Rather Than On Respondent Knabe's Alleged Wrongful Conduct."*

"QUESTION NO. 3: [2] . . . *A Conflict Among the State Courts About the Constitutionality Of SLAPP Statutes"* (Petition, iv).

Reasons for Knabe Objection to Misstatements

[1] As discussed hereinabove, the lawsuit was not dismissed "because [Swanson] was a rival political candidate" of Knabe.

[2] As discussed hereinabove, there is not a "conflict among the states."

C. Swanson's Misstatement

[1] "Certiorari could also be properly granted under Supreme Court Rule 10(a)" (Petition, 2).

Reasons for Knabe Objection to Misstatement

[1] As set forth hereinabove, Certiorari cannot be granted under Supreme Court Rule 10(a).

D. Swanson's Misstatement

[1] "the provisions of California's SLAPP statute have already been found to be unconstitutional by the New Hampshire Supreme Court. . . . " (Petition, 3).

Reasons for Knabe Objection to Misstatement

[1] As set forth hereinabove, the New Hampshire Supreme Court's ruling was based on the New Hampshire state constitution and thus is inapposite.

E. Swanson's Misstatements

[1] [Swanson was deprived of] *"any opportunity to take discovery"* and [2] *the California*

> *Courts "focus[ed] on her status as a rival political candidate rather than on Knabe's alleged wrongful conduct. . . . "* (Petition, 3).

Reasons for Knabe Objection to Misstatements

[1] As discussed hereinabove, Swanson was given an opportunity to take discovery. She could have done so upon a showing of good cause, but failed to make the necessary showing.

[2] As discussed hereinabove, the courts did not focus on Swanson's status as a rival political candidate rather than on Knabe's alleged wrongful conduct.

F. Swanson's Misstatement

[1] "Because Knabe was a rival political candidate, the California courts held this lawsuit was subject to the SLAPP statute. . . . " (Petition, 4).

Reasons for Knabe Objection to Misstatement

[1] As discussed hereinabove, the California courts did not find Swanson's lawsuit to be a SLAPP "because Knabe was a rival political candidate."

G. Swanson's Misstatement

[1] "[T]he trial court ignored Swanson's objections . . . " (Petition, 8).

Reasons for Knabe Objection to Misstatement

[1] The trial court did not ignore Swanson's objections; it merely overruled them.

H. Swanson's Misstatement

[1] "the court dismissed Swanson's lawsuit with prejudice" (Petition, 11).

Reasons for Knabe Objection to Misstatement

[1] The court did not dismiss Swanson's lawsuit with prejudice; it merely granted Knabe's special motion to strike the Complaint, thereby dismissing the lawsuit.

Throughout the remainder of Swanson's Petition, from pages 12-25, Swanson repeats these same misstatements time and time again. As these misstatements are quite apparent, and as Knabe's objections thereto have been duly noted, Knabe will refrain from referring to each and every misstatement.

CONCLUSION

Based on the foregoing, Swanson's Petition for Writ of Certiorari should be denied.

Dated: May 27, 1997

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